

E-FILED - 8/12/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORLANDO PEREZ,)	No. C 06-5220 RMW (PR)
)	
Plaintiff,)	ORDER GRANTING
)	DEFENDANT'S MOTION TO
v.)	DISMISS; DENYING
)	MOTION TO COMPEL
M.S. EVANS,)	
)	
Defendant.)	
_____)	(Docket Nos. 16, 21)

Plaintiff, an inmate at Salinas Valley State Prison ("SVSP"), filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983. After reviewing the complaint, the Court found that it stated a cognizable Eighth Amendment claim for being continuously confined to lockdown without adequate outdoor exercise, resulting in physical and emotional suffering. In the same order, the Court directed defendant, the warden of SVSP, to file a dispositive motion or notice that he is of the opinion that such a motion is not warranted in this case. Defendant filed a motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that plaintiff failed to exhaust administrative remedies. Plaintiff has filed an opposition to defendant's motion to dismiss, and defendant filed a reply. Also pending is plaintiff's Order (sic) Compelling Disclosure and Discovery, to which defendant has filed an opposition, and plaintiff filed a reply.

DISCUSSION

A. Motion to Dismiss

1. Standard of Review

Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense; defendants have the burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). A nonexhaustion claim should be raised in an unenumerated Rule 12(b) motion rather than in a motion for summary judgment. Id. In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.¹ If the court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal without prejudice. Id. at 1120.

2.. Analysis

The Prison Litigation Reform Act ("PLRA") of 1995 amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the discretion of the district court. Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)). Exhaustion is a prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve general conditions or particular episodes, whether they allege excessive force or some other wrong, and even if they seek relief not available in grievance proceedings, such as money damages. Porter v. Nussle, 122 S. Ct. 983, 988, 992 (2002). Furthermore, administrative remedies may not be exhausted where the grievance, liberally construed, does not have the same subject and same request for relief. See generally O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-63 (9th Cir. 2007) (even with liberal construction, grievance requesting a lower bunk due to poor balance resulting from a previous brain injury was not equivalent to, and

¹ If the court looks beyond the pleadings in deciding an unenumerated motion to dismiss for failure to exhaust -- a procedure closely analogous to summary judgment -- the court must give the prisoner fair notice of his opportunity to develop a record. Wyatt, 315 F.3d at 1120 n.14. Plaintiff was given such notice in the May 23, 2007, order in this matter.

1 therefore did not exhaust administrative remedies for, claims of denial of mental health treatment
2 in violation of the ADA and Rehabilitation Act).

3 The State of California provides its prisoners and parolees the right to appeal
4 administratively “any departmental decision, action, condition or policy perceived by those
5 individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order
6 to exhaust available administrative remedies within this system, a prisoner must proceed through
7 several levels of appeal: (1) informal review, (2) first formal written appeal on a CDC 602
8 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third
9 level appeal to the Director of the California Department of Corrections and Rehabilitation
10 (“Director”). See Barry v Ratelle, 985 F. Supp 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code
11 Regs. tit. 15, § 3084.5). A final decision from the Director’s level of review satisfies the
12 exhaustion requirement under § 1997e(a). See id. at 1237-38.

13 3. Plaintiff’s claim

14 In his complaint, plaintiff alleges that defendant has confined him to continuous
15 segregation without adequate access to outdoor exercise. Further, he alleges that this deprivation
16 caused him extreme loss of physical therapy necessary for his health and the lack of physical
17 exercise is cruel and unusual punishment. Defendant argues that plaintiff failed to
18 administratively exhaust this claim prior to filing his complaint, and therefore, this action should
19 be dismissed for failure to exhaust administrative remedies in accordance with 42 U.S.C.
20 § 1997e(a). In response, plaintiff asserts that the PLRA does not require a heightened pleading
21 standard, and his administrative appeals gave the defendant adequate notice that he was
22 complaining about the deprivation of outdoor exercise.

23 The parties agree and the record indicates that plaintiff exhausted his administrative
24 remedies in regards to inmate appeal number SVSP-05-04039. See Complaint, pp. 1-2;
25 Defendants’ Reply to Plaintiff’s Opposition to Defendants’ Motion to Dismiss (“Reply”), p. 3.
26 After the prison bypassed the informal review level, see Complaint, p. 2, on September 29, 2005,
27 plaintiff submitted appeal number SVSP-05-04039 for his first formal appeal, contending that
28 the prison should give canteens and packages to all inmates; the prison should release the

1 prisoners in Facility “A” from continuous lockdown unless it could prove that there was a
2 plausible threat to safety; the blanket imposition of discipline denies him the “common decency
3 of personal hygiene;” the lockdowns rendered the Men’s Advisory Council obsolete; and the
4 prison was engaging in enacting lockdowns with no proof of necessity. See Declaration of T.
5 Emigh in Support of Defendant’s Motion to Dismiss (“Decl.”) Exhibit D-3, D-5. The appeal
6 was denied. Id., Exhibit D-4.

7 Thereafter, plaintiff filed his second formal appeal, contending that continuous lockdown
8 procedures created a hostile environment; the prison was disregarding its own procedures with
9 respect to discipline; not all prisoners are receiving canteens and packages; the act of segregation
10 not related to disciplinary action is unfair; the general conditions of confinement are being in
11 solitary confinement with no time for out-of-cell exercise; the prison should institute a regular
12 program of privileges in order to prevent inmate fighting. Id., Exhibit D-6 - D-11. The appeal
13 was partially granted. Id., Exhibit D-12, D-13.

14 Plaintiff filed a Director’s level of review, contending that the prison is using
15 unsubstantiated safety concerns to keep the facility on lockdown, which restricts the giving of
16 canteens and affects personal hygiene. Id., Exhibit D-14, D-15. Plaintiff’s appeal for a
17 Director’s level of review was denied. Id., Exhibit D-1, D-2. The reviewing officer found that
18 the prison was operating under standard practice by placing Facility “A” on a modified program
19 after disturbances and, unless and until staff can ascertain the threat status of individual inmates
20 to others, the inmate remains on a modified program status which is consistent with the
21 Department Operations Manual. Id.

22 Section 1997e(a) requires that plaintiff present his claims to each level of administrative
23 review before raising the claims in a § 1983 action in federal court. See Woodford v. Ngo, 548
24 U.S. 81, 88 (2006) (“Exhaustion gives an agency an opportunity to correct its own mistakes with
25 respect to the programs it administers before it is haled into federal court, and it discourages
26 disregard of [the agency’s] procedures.”) (internal quotations omitted). Plaintiff’s appeal at the
27 Director’s level addresses only the arbitrariness of lockdown, the restrictions on canteens and
28 personal hygiene, and the unsubstantiated safety concerns; it does not mention inadequate

1 outdoor exercise or resulting damage to his health. See Decl., Exhibit D-14, D-15; Complaint, p.
 2 3. Even liberally construed, plaintiff's exhausted inmate appeal does not have the same subject
 3 as the claim raised in the present action: that he received inadequate outdoor exercise and
 4 therefore was deprived of the physical therapy necessary to meet his health needs. See O'Guinn
 5 v. Lovelock Correctional Center, 502 F.3d 1056, 1062 (9th Cir. 2007). Because plaintiff failed
 6 to properly exhaust his administrative remedies as to his stated claim of inadequate outdoor
 7 exercise and damage to his health needs to the highest level of administrative review, such claim
 8 is DISMISSED without prejudice.

9 B. Order Compelling Disclosure and Discovery

10 The court has reviewed plaintiff's motion to compel and responses thereto. Plaintiff may
 11 file a motion to compel discovery only after he satisfies the "meet and confer" requirements of
 12 the discovery rules. See Fed. R. Civ. P. 37(a)(2)(A); L. R. 37-1(a). Rather, if his discovery
 13 requests are denied and he intends to seek a motion to compel he need only send a letter to
 14 defendants to that effect, offering them one last opportunity to provide him the sought-after
 15 information. It is clear from plaintiff's motion that he has not done so. Accordingly, plaintiff's
 16 motion to compel is hereby DENIED.

17 **CONCLUSION**

18 Plaintiff's complaint is hereby DISMISSED for failure to exhaust administrative
 19 remedies (docket no. 21). Plaintiff's motion to compel is DENIED (docket no. 16). The clerk
 20 shall terminate any remaining motions and close the file.

21 IT IS SO ORDERED.

22 DATED: 8/8/08


 23 RONALD M. WHYTE
 United States District Judge